

*United States Court of Appeals
for the Second Circuit*



APPENDIX

76-2077

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-2077

VICTOR PANICA,
Petitioner-Appellant,
—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

THOMAS M. FORTUIN,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

B
P/S



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TABLE OF CONTENTS TO APPENDIX

	PAGE
Notice of Motion dated March 22, 1974	A-1
Affidavit of Marvin Preminger sworn to March 22, 1974	A-3
Handwritten statement, author unidentified	A-7
Affidavit of Arthur J. Viviani sworn to May 1, 1974	A-10
Affidavit of Walter J. Higgins, Jr., sworn to May 1, 1974	A-21
Reply Affidavit of Marvin Preminger sworn to May 7, 1974	A-23
Affidavit of Albert Pierro sworn to February 21, 1974	A-26
Memorandum Decision, the Honorable Lee P. Gagliardi, United States District Judge, dated November 21, 1974	A-28
Notice of Motion dated August 1, 1975	A-31
Affidavit of Victor Panica sworn to August 1, 1975	A-32
Memorandum of Law in Support of Motion to Vacate Sentence	A-36
Affidavit of Stanley M. Meyer sworn to July 24, 1975	A-41
Affidavit of Herman Race sworn to July 1, 1975	A-43
Affidavit of Lt. Carter dated June 1973	A-45
Affidavit of Thomas M. Fortuin sworn to February 10, 1976	A-47
"Traverse in Opposition to Motion to Vacate" sworn to by Victor Panica, February 20, 1976	A-53

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

NOTICE OF MOTION

Indictment No. 72 CR 313

Defendant.

X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of MARVIN PREMINGER, sworn to the 22nd day of March, 1974, the exhibit annexed thereto, and upon all the prior proceedings had herein, the undersigned will move this Court, before Honorable LEE GAGLIARDI, at the Courthouse, Foley Square, New York, New York, on the day of March, 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting the defendant a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, on the basis of newly discovered evidence, and for an order discharging the defendant from custody pursuant to 28 U.S.C. Section 2255, on the grounds that the conviction obtained herein was obtained in violation of defendant's right to due process of law, was obtained in part by the unlawful suppression of evidence by the prosecution and was in other ways violative of defendant's right to a fair trial, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York
March 22, 1974

Yours, etc.,

MARVIN PREMINGER, ESQ.
Attorney for Defendant
Office & P.O. Address
66 Court Street
Brooklyn, New York 11201
834-8888

TO: HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Clerk of the United States
District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

Defendant.

----- X
AFFIDAVIT

Indictment No.
72 CR 313

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

MARVIN PREMINGER, being duly sworn, deposes and says:

I am the attorney for the defendant, VICTOR PANCIA, who was convicted, after a jury trial, of Conspiracy to Districeute Narcotic Drugs and Possession of Narcotic Drugs, in violation of 21 U.S.C., Sections 812, 841(a)(1) and 841(b)(A). The conviction was rendered on June 14, 1972 and defendant was sentenced to concurrent terms of twenty years in prison on each count.

His conviction was thereafter affirmed by the United States Court of Appeals on December 14, 1972, and certiorari was thereafter denied by the Supreme Court.

The case involved a situation where the defendant was a passenger, not the driver, of a car being used to transport heroin, and where the defendant's role was ambiguous at best. He did not load the car, the trunk of the car in which the narcotics were contained was never opened in his presence and although the other co-conspirators had been under surveillance for over a month, there was no evidence of any prior association between them and the defendant and no declarations of the co-conspirators were offered into evidence. The only act that the defendant allegedly committed was to run away

from the car when the arrests were made and to attempt to falsely disassociate himself from the car and its driver.

The Court of Appeals opinion concisely sets forth the evidence adduced against the defendant:

"After transferring the heroin from Pierro's house to (the trunk of) Christophe's car, Christophe drove directly to the Plaza Diner where he met Panica (the appellant) and DeSimone. Following a short discussion (not overheard by the agents), Panica got into the Cadillac containing the heroin and the \$150,000. and drove off with Christophe. When the car halted after a high speed chase by federal agents, Panica fled on foot. When he was confronted immediately thereafter by Agent Harrington in the bar, Panica made the false exculpatory statement that he had been there for an hour and a half, which covered the time from which the narcotics were first placed in the car through the period of the police chase."

Opin. p. 1052

In addition, the Court said that because of the attempt to run away and falsely disassociate himself with the occupants of the car, that alone could lead a jury to infer that he knew what was going on.

"Taken together these facts provided enough evidence from which a jury could find that (appellant) knew what was going on and that by his presence he was attempting to assist the success of the operation and, therefore, that he was a member of the conspiracy. Cf. U.S. v. Geaney, 417 F.2d 1116, 1121 (2nd Cir. 1969) cert. den. 397 U.S. 1028 (1970)."

Opin., pp. 1052-1053

Sometime ago, during last summer, I was advised that one of the co-defendants, one NICHOLAS CHRISTOPHE, had admitted to a federal employee in the Federal House of Detention at West Street that the defendant, VICTOR PANICA, had nothing to do with the crime, but more important, that he was pressured and threatened by Assistant United States Attorney HIGGINS from coming forward and attesting to that fact on the threat that he would be prosecuted for various bank robberies. We were told that CHRISTOPHE had admitted that the Assistant United States Attorney insisted that he could not take the witness stand and tell the truth to exonerate Mr. PANICA.

We hired a private investigator and he contacted the federal employee, who incidentally is still employed, to the best of our knowledge, at the Federal Detention Headquarters, and obtained a statement from that employee completely corroborating what our client told us.

I have annexed hereto a photostatic copy of that statement. However, I have blocked out portions of that statement on the photostat only so as not to reveal the identity of the employee at this time to prevent possible pressure on him, since improper conduct on the part of an Assistant United States Attorney is alleged. Of course, I will reveal his identity and exhibit the original statement to the Court subject to the Court's directive. In addition, my client has a statement of the co-defendant, ALBERT PIERRO, who is now in jail, which tends to corroborate CHRISTOPHE's statement that PANICA was merely an innocent bystander in the case.

I believe that in view of the serious nature of the allegations, a hearing is warranted, since the conviction against the defendant may have been obtained in violation of his right to a fair trial and partly through the improper efforts of one of the prosecutors. The evidence referred to herein was not known at the time of trial and was obtained only this past summer. This proceeding was not brought on prior to this time due to the fact that we were investigating the matter, pursuing other leads and also because of my own trial schedule.

Our investigation also shows that MR. CHRISTOPHE has become a federal informant. He has been, to the best of our knowledge, aiding the F.B.I. and furnishing them with information. In fact, we have learned that he is separated from his wife because of the fact that he was offered a new identity in some other location and she refused to go along with it. I am led to the inescapable conclusion that MR. CHRISTOPHE was a federal informant at the time this case was tried, and if that is the case, the defendant's constitutional

rights were further violated, because MR. CHRISTOPHE and the defendant, VICTOR PANICA, were represented by the same attorney. Obviously, PANICA did not know of CHRISTOPHE's status at the time of the proceeding. If it develops that this was the fact, that the "spy in the camp" doctrine had been violated, the appellant's right had been diluted not only because of the failure of the Government to provide defendant with exculpatory material according to the Brady case, but because the Supreme Court has disapproved of the Government allowing an informant to interject himself into the attorney/client relationship of defendants. Coplon v. United States, 191 F.2d 749 (D.C. Cir.) cert. den. 342 U.S. 926 (1951); Caldwell v. United States, 205 F.2d 879, (D.C. Cir. 1953); United States v. Zarzour, 431 F.2d 1 (5th Cir. 1970). If this situation is found to exist, especially according to the Caldwell case, the conviction herein would have to be invalidated.

WHEREFORE, your deponent respectfully requests that a hearing be had and that upon the conclusion of said hearing that the judgment herein be vacated, the defendant be discharged from custody, or in the alternative, that the defendant be afforded a new trial.

MARVIN PREMINGER

Sworn to before me this
22nd day of March, 1974

STANLEY J. WEISS
NOTARY PUBLIC State of New York
No. 30-2684055
Qualified in Nassau County
Commission Expires March 30, 1978

Page #1 - Statement of [REDACTED]

Wednesday, August 8, 1973 - 10:15 A.M. on West 12th Street & West St. My name is [REDACTED].

I am [REDACTED] years of age and reside at the [REDACTED]

which is the [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

was a member of the [REDACTED].

It may have been earlier, 1961) and then I was attached to the [REDACTED]. On [REDACTED]

I will be a Federal [REDACTED] [REDACTED]

which will [REDACTED]. However, I do

have a total of 15 years in government service.

I have never been arrested and twice investigated

and cleared by the FBI for Federal employment.

I am presently single and expect to be married

in the fall. I [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

About October of 1972, while I was working on

A 22

the floors, I became acquainted with an inmate
by the name of Nicholas Christophe, they call him
"Nippy" because of a professional relationship, as
~~officer~~ to an inmate, we began to talk to one
another. One particular time, I noticed he
was standing by the sink, ~~but he~~ ^{no one} else
was there, and he was crying. I asked him
"What's the matter, are you alright?" I was
Is the above true? Yes [redacted]

wondering if he was sick or what it was that
was bothering him. He seemed confused and upset.
He said to watch Victor Panica, he was worried
about him, that he was afraid of Panica. I know
who Panica was, I used to see them together.
Then he told me that he did a bad thing,
that if he had testified at the trial at Panica,
Panica would not be in jail today. Then, he said
not to say anything to anybody else, it's a secret.
When I asked him why he did not take the witness
stand to clear Panica, he said the U.S. Attorney had
told him that if he took the witness stand to
clear Panica, he, the U.S. attorney would prosecute
him for Bank Robberies. That's what he said
and that's why I am saying it. He insisted
that the U.S. Attorney would not let him tell
the truth to clear Panica. Frankly, all this

worried me. I didn't want to have to carry all this around. I wanted to tell the truth as to what was told to me. On two separate occasions. Mippy told me all this, although through October and November of 1972, he would always be talking to me. I would ask "How are you doing, Mip" and he would say "Okay, ~~_____~~". Are you still keeping my secret. Don't forget, don't say anything". I told him not to worry. But, all this bothered me. I want the truth to come out, but is the above true? Yes ~~_____~~
With all that stuff on Watergate and T.V. I'm wondering if they'll believe me even though I am telling the truth. I find it hard to believe that the U.S. Attorney would stoop to do what he's accused of but that's what Mippy told me. It's still fresh in my mind, I can't forget it.

I am making this statement freely and voluntarily. No one has threatened me, intimidated me or coerced me into making this statement. I have not been offered any compensation, nor do I expect to receive any. I would not take anything from anybody to tell the truth. I might be harassed on my job for what I am doing but I must tell the truth. As I say, I call the shot the way I see it. I have read this 2 1/2 page statement, I understand it and it is the truth.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

: AFFIDAVIT

VICTOR PANICA, :

: 72 Cr. 313

Defendant. :

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.
SOUTHERN DISTRICT OF NEW YORK)

ARTHUR J. VIVIANI, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney
in the office of PAUL J. CURRAN, United States Attorney
for the Southern District of New York, and I am assigned
to and familiar with the facts of the captioned case.

2. I make this affidavit in opposition to
the defendant's motions for a new trial due to newly
discovered evidence pursuant to Rule 33, Federal Rules
of Criminal Procedure (FRCP), and for an order discharging
him from custody pursuant to 28 U.S.C. § 2255.

A 11
Prior Proceedings

3. On March 17, 1972, Indictment 72 Cr. 313 was filed in two counts charging Victor Panica, Albert Pierro, Nicholas Christophe and Frank De Simone with possession of 39.8 pounds of heroin with intent to distribute and conspiracy so to do in violation of Title 21, United States Code, Sections 812, 841 and 846. (Indictment 72 Cr. 313 superseded Indictment 72 Cr. 138 which charged the same defendants with the same basic offenses). On March 21, 1972, all the defendants entered pleas of not guilty to Indictment 72 Cr. 313. All but De Simone were remanded to West Street in lieu of bail.

Thereafter, a request for a severance was one of the many pre-trial motions filed on behalf of the defendant Panica by his counsel, Gino Gallina, Esq.. Specifically, by notice of motion dated April 14, 1972 and filed under the superseded Indictment (72 Cr. 138), Panica and Mr. Gallina executed affidavits in support of the severance motion. Panica basically claimed in his affidavit that he "had no knowledge or connection with, the presence of narcotics or any other contraband in the vehicle seized in the case" and that he did not intend to commit the crime charged in the indictment. Mr. Gallina in his affidavit alleged the following:

"4. That the defendants FRANK DE SIMONE and NICHOLAS CHRISTOPHE must be called as witnesses to testify as an integral part of the defense of VICTOR PANICA.

"5. That I have been informed by the defendant NICHOLAS CHRISTOPHE that it is his intention not to testify at his own trial and that he has been so advised by his attorney Jeffrey C. Hoffman, Esq..

"6. That I have been further advised by Mr. Hoffman that he has no objection to NICHOLAS CHRISTOPHE testifying at a separate trial of VICTOR PANICA and have also been advised by Mr. Christophe that he is willing to testify at such a trial.

"7. That I have been informed by the defendant FRANK DE SIMONE that it is his intention not to testify at his own trial and he has been so advised by his attorney James La Rosa, Esq.. However, I have been further advised by the defendant DE SIMONE that he has no objection to testifying at a separate trial of VICTOR PANICA.

"8. That I have been advised by Messrs.
De Simone and Christophe that they
would give exculpatory testimony
concerning the defendant VICTOR PANICA,
if Mr. Panica were tried separately
and apart from themselves.

"9. That I have been advised Mr. De Simone
would testify if tried separately and
apart from Mr. Panica that he had no
communication at any time with Mr. Panica
concerning the events which formed the
basis for the charges in this case.

Further, that he at no time saw Mr. Panica
at Mr. Pierro's home nor did he ever
have any conversations with any of the
co-defendants concerning the defendant
Panica as relates to the charges in
this case.

"10. That I have also been informed by
Mr. Christophe that he would give
exculpatory testimony concerning the
defendant Panica if tried separately
and apart from Mr. Panica in that he
would testify that he never had any
discussions with Mr. Panica concerning
the events charged in this case, that

Mr. Panica was in no way connected with the contraband allegedly found in the automobile in this case, that he had never revealed to Mr. Panica the fact that any contraband was located in said automobile, and that to his knowledge Mr. Panica was completely unaware of any contraband in said automobile." (Affidavit of Gino Gallina, Esq., Sworn to on April 18, 1972).

The motion was denied on or about April 19, 1972.

On April 21, 1972, a hearing on the defendants motions to suppress evidence began before the Honorable Lee P. Gagliardi, United States District Judge, Southern District of New York. It concluded on April 25, 1972, and Judge Gagliardi ultimately denied the motion.

The following events occurred on April 26, 1972.

First, Pierro changed his plea to guilty. Second, Christophe waived his right to a trial by jury and agreed to proceed to trial before Judge Gagliardi on the record of the motion to suppress. Third, a jury trial of Panica and De Simone commenced with the other two defendants being severed for the above reasons.

Mr. Panica was in no way connected with the contraband allegedly found in the automobile in this case, that he had never revealed to Mr. Panica the fact that any contraband was located in said automobile, and that to his knowledge Mr. Panica was completely unaware of any contraband in said automobile." (Affidavit of Cino Gallina, Esq., Sworn to on April 18, 1972).

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On April 28, 1972, the Court granted De Simone's motion for judgment of acquittal after the Government rested. Immediately thereafter, trial counsel for Panica, Vincent Lanza, Esq., and co-counsel, Gino Gallina, Esq., sought to have Christophe brought to Court.

Counsel for the Government informed the Court that Christophe's counsel, Jeffrey Hoffman, Esq., had advised him that if Christophe were called as a witness, he would assert his privilege not to incriminate himself. Upon that representation, the Court ruled that it would not allow Christophe to be called as a witness if he in fact intended to assert his privilege. After some colloquy, Mr. Lanza agreed to accept the word of Christophe's counsel that the privilege would be asserted thereby avoiding the delay which would result from having Christophe brought from West Street to the Court (Trial transcript, pp. 170-173).

Shortly thereafter, the following occurred:

"Mr. Higgins: With respect to Mr. Christophe, it is the Government's understanding that the defendant Panica will not be calling Mr. Christophe in its case.

The Court: The Court has been so informed and I understand that is the decision of the defendant Panica." (183)

Mrs Hoffman then confirmed his client's position. (183-184).

The defendant Panica then presented his case, and two witnesses, Edward Gableski and Daniel Capano, testified on his behalf. At no time does the record reflect that Mr. Lanza or Mr. Gallina requested the testimony of Pierro (who had entered a guilty plea) or De Simone (who had been acquitted).

On May 2, 1972, trial of Panica concluded when the jury found him guilty as charged.

On May 12, 1972, Pierro moved to withdraw his plea of guilty and decision was reserved.

On May 25, 1972, Pierro's motion was granted, both he and Christophe were tried before Judge Cagliardi and both found guilty.

On June 20, 1972, all the defendants were sentenced, and Panica received a 20 year term of imprisonment.

On February 26, 1973, the mandate of the Court of Appeals for the Second Circuit affirming the judgment of conviction was filed in the District Court.

On May 17, 1973, the order of the United States Supreme Court denying a petition for certiorari was filed in the District Court.

Present Proceedings

4. The defendant now moves for relief under Rule 33, F.R.C.P., and under 28 U.S.C. § 2255. The only evidence supporting his motions consists of hearsay, i.e., the affidavit of his apparently new attorney, Marvin Preminger, and an unsworn statement of an unidentified guard at West Street. These papers appear to allege three grounds for relief:

1. That the potential evidence which could be offered by Pierro and Christophe was not known at the time of the trial;
2. That Christophe did not testify on behalf of Panica at the trial because of the threats of further prosecutions made by Assistant United States Attorney Walter J. Higgins, Jr.; and
3. That, because "our investigation also shows that Mr. Christophe has become a federal informant..."

I am led to the inescapable conclusion that Mr. Christophe was a federal informant at the time this case was tried....", thereby concluding that the "spy in the camp" doctrine had been violated.

5. The allegation that the evidence that

Christophe, Pierro and even De Simone could offer as to Panica's "innocence" was "newly discovered" is absolutely and unequivocally groundless. The record of the trial and the pre-trial severance motion submitted by Mr. Gallina clearly establish that this evidence was known well before trial. Of the 3 co-defendants, the only one whom Panica sought to call was Christophe who asserted his privilege as he had every right to do. Neither De Simone (who was acquitted) nor Pierro (who had pled guilty) were called, nor did counsel request a subpoena for them despite the fact that counsel knew or should have known that both could offer exculpatory testimony.

6. The defendant's second claim, i.e., that Christophe did not testify at Panica's trial due to threats from the prosecutor, is supported only by hearsay appearing in an unsworn document of an unidentified guard. Moreover, the allegation is directly contradicted by the record of the trial, i.e., Christophe's only reason for not testifying was the fear that he would incriminate himself.

7. Lastly, the third allegation, i.e., that Christophe was an informant when the case was tried and, therefore, was a "spy in the camp", is completely unsupported by any factual allegation. Rather, it is alleged simply as a conclusion or guess of Mr. Preminger.

Wherefore, the motions should be denied without a hearing for the reasons set forth above, in the attached affidavit of Walter J. Higgins, Jr. and in the accompanying memorandum of law.

ARTHUR J. VIVIANI
Assistant United States
Attorney

Sworn to before me

this date MAY 1 1974.

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

AJV:lm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :
" " : AFFIDAVIT
VICTOR PANICA, : 72 Cr. 3/3
Defendant. :
-----X

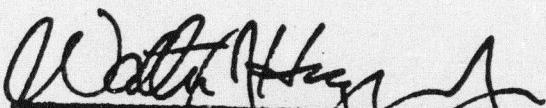
STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

WALTER J. HIGGINS, Jr. being duly sworn,
deposes and says:

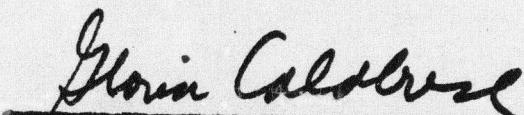
1. I am an Assistant United States Attorney in the Office of Paul J. Curran, United States Attorney for the Southern District of New York, and as such am familiar with the above-captioned case.
2. I make this affidavit in opposition to the motion of Victor Panica for an Order of this Court setting aside the judgment of conviction on the grounds of newly discovered evidence or that it was improperly obtained.

A 22

3. I was in charge of the prosecution of the defendant's case from the date of his arrest in January, 1972 through September 1972. I never threatened Nicholas Christophe that if he should testify on behalf of Victor Panica at his trial so as to exculpate Panica that he, Christophe, would be prosecuted for other offenses. To my knowledge, Nicholas Christophe was not an informant or cooperating witness from the date of his arrest in January, 1972 through the date of his sentence.


WALTER J. HIGGINS, JR.
Assistant United States Attorney

Sworn to before me this
15th day of May 1974.


NOTARY PUBLIC

GLORIA CALARRESE
Notary Public, State of New York
No. 24-0-33340
Qualified in Kings County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

REPLY AFFIDAVIT

Indictment No.
72 CR 313

Defendant.

----- X
STATE OF NEW YORK)
COUNTY OF KINGS) SS.:
)

MARVIN PREMINGER, being duly sworn deposes and says:

I am the attorney for the defendant herein and make this affidavit in reply to the answering affidavits of ARTHUR J. VIVIANI and WALTER J. HIGGINS, Jr., Assistant United States Attorneys.

I have read through the affidavit of MR. VIVIANI, the main one in opposition to the application for relief herein, and submit that, if anything, that affidavit supports the defendant's position rather than weakens it.

MR. VIVIANI traces the history of this case and points out that the attorney for the defendant, VICTOR PANICA, made a severance motion on the grounds that he intended to call NICHOLAS CHRISTOPHE on behalf of PANICA. Although the motion was denied, thereafter the defendant, PANICA, went to trial alone, and CHRISTOPHE's attorney advised everyone that his client would plead his privilege of self-incrimination if he was called on to testify as a witness. Thus, the Assistant United States

Attorney demonstrates in his own affidavit that PANICA wanted CHRISTOPHE as a witness, and that whether or not CHRISTOPHE was willing to testify when the severance motion was first made, there came a point during the trial where he announced he would plead his privilege (Government's affidavit, p. 6, trial transcript, p. 170-173, 183-184).

The very thrust of the entire application in this case is that that decision on the part of CHRISTOPHE not to testify on PANICA's behalf was a decision forced upon him by the Assistant United States Attorney who tried this case, and the opposing affidavit herein, which points out an apparent change of heart in MR. CHRISTOPHE, lends weight to the argument of the defendant.

We should also like to point out that the Government refers to the evidence supporting our application as mere hearsay and seeks to deprecate the affidavit of the guard annexed to the moving papers. It is such a factual affidavit of a witness, rather than the attorney alone, that this Court has always required before hearings are granted, and we suggest that the issues raised by that affidavit present very serious questions of suppression of evidence by the Government herein. It is just this sort of conduct that has been condemned by practically every Court in this country, and is just about the best grounds one can imagine for the granting of the hearing.

We did not manufacture the prison guard, and in fact no member of this firm solicited or approached him. The reason his name was deleted was to prevent any attempt to interfere with him, and as we stated in our affidavit, we will gladly make his name available to the Court. This is not merely an unsworn document of an unidentified guard, as characterized in the affidavit of the Assistant United States Attorney, but I think

it is a significant piece of evidence to show that justice was not served in this case.

In further support of the application, we have annexed hereto an affidavit of ALBERT PIERRO, one of the co-defendants, which was sent to us from the prison in Atlanta, where he is presently incarcerated. That affidavit indicates, credibility problems aside, that the defendant said that he overheard CHRISTOPHE tell PANICA that he would exonerate him on the witness stand. He also corroborates other portions of the prison guard's statement regarding activities on the part of the prosecutor.

It is curious that the Government even opposes our application. The fact is defense counsel made his intentions known in that he was going to call CHRISTOPHE as a witness, but all of a sudden, at the appropriate time, CHRISTOPHE decided that he would not testify, and thereafter an unimpeachable witness, a Federal employee, revealed that CHRISTOPHE told him his action was taken under pressure from the Government. If this is not new evidence, and evidence which warrants a hearing, I don't know what is. I also think the Government would have a desire to get to the bottom of this just as much as the defendant.

It is respectfully submitted that this is exactly the type of case where strong and serious issues of fact are present and a hearing is certainly warranted.

MARVIN PREINGER

Sworn to before me this

7th day of May, 1974.

I, ALBERT PIERO, after being duly sworn, deposes and says; that I am making the following statements of my own free will; that no threats, or promises, of any nature have been made to me as an inducement for me to give this sworn affidavit; that the following is motivated, and dictated, by the demands of my conscience insofar as I know that an innocent man, Victor Panica, is in prison for a crime that he did not commit.

1. That I am a co-defendant of Victor Panica and Nicholas Christopher, in Indictment No. 72 Cr 313.

2. That before my arrest, on January 27, 1972, I had never seen Victor Panica; nor was I acquainted with Nicholas Christopher prior to said date.

3. That we were locking together in the same Maximum Security cell in C-1, at the Federal Detention Headquarters, 427 West Street, New York City.

4. That in the early part of April, 1972, I overheard Nicholas Christopher, tell Victor Panica that he should not worry about being on the indictment because when the proper time arrived he (Nicholas Christopher) would take the witness stand and exonerate Victor Panica from any guilt because he, Panica, had nothing to do with this case and was merely an unfortunate innocent bystander.

5. That shortly thereafter Nicholas Christopher told me personally, outside of Panica's hearing range, that he (Christopher) would do anything Mr. Higgins, Assistant United States

Attorney for the Southern District of New York, told him to do as long as Mr. Higgins promised him that he would be allowed to visit his sick daughter.

6. That I did not make the above facts known to Victor Panica, nor did I take the stand on his behalf, because of my fear that the prosecutor's office would retaliate by framing me on a different and unrelated narcotics conspiracy case; and that the fear remains very real. However, I have since come to know Victor Panica and I have become aware of the fact that he, like myself, has a wife and family. The knowledge that his family is suffering for something that he, Panica, is innocent of is troubling my conscience and will no longer allow me to remain silent.

Accordingly, I affix my signature hereto.

Albert Pierro

Albert Pierro

Sworn to before me this
21 day of February 1974.

James K. T. Leagle

Permit Officer. Authorized by the Act of
 July 7, 1957 to Administer Oaths (See U.S.C.
 4704).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
NOV 20 1974
S.D. OF N.Y.

-----x
UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

Defendant.

72 Cr. 313

MEMORANDUM
DECISION

-----x
MAGLARDI, D. J.

#41485

This is a motion for a new trial, pursuant to 28 U.S.C. § 2253 Fed. R. Crim. P., and a petition for a writ of habeas corpus, pursuant to 18 U.S.C. § 2255.

Defendant Panica was convicted on both counts of the indictment charging possession of heroin with intent to distribute (21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A)) and conspiracy to violate these sections. At a separate trial two of Panica's alleged co-conspirators, Nicholas Christophe and Albert Pierro were tried together and were also convicted. The three convictions have been affirmed. United States v. Christophe, 470 F.2d 865 (2d Cir. 1972).

Panica's motions seek relief on the ground of newly discovered evidence and both are supported by two affidavits. One of these is an unsworn statement of a federal employee in the Federal House of Detention wherein Christophe was incarcerated. The employee states that he came upon Christophe

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NOV 25 1974

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crying in his cell and asked him if anything was wrong. Christophe replied that "if he had testified at the trial of Panica, Panica would not be in jail today." And further, that "the United States Attorney had told him [Christophe] that if he took the witness stand to clear Panica, he, the United States Attorney, would prosecute him for bank robberies."

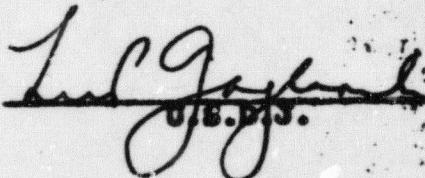
The second affidavit is from Pierro and he avers that, prior to the trials on this indictment, he overheard conversations between Panica and Christophe wherein the latter told Panica that "when the proper time arrived he would take the witness stand and exonerate Victor Panica from any guilt." Pierro also states that Christophe told him personally, "outside of Panica's hearing range that he [Christophe] would do anything Mr. Higgins [the assistant United States Attorney in charge of the case] told him so long as Mr. Higgins promised him that he would be allowed to visit his sick daughter." Pierro further states that he has remained silent on the subject until this time because he too feared reprisals from the United States Attorney's office.

In opposition to both motions the Government has submitted, inter alia, a sworn affidavit of former assistant United States Attorney Higgins categorically denying that he made any of the threats that are alleged.

Ordinarily, a hearing should be held upon a motion made pursuant to §2255 unless the motions, files and records "of the case conclusively show that a prisoner is entitled to no relief." See Fontaine v. United States, 411 U.S. 213 (1973); Dalli v. United States, 491 F.2d 758 (2d Cir. 1974); Taylor v. United States, 487 F.2d 307 (2d Cir. 1974). Clearly the affidavits submitted by Panica are not sufficient to warrant relief because they do not qualify as proper evidentiary material to support a petition under §2255, D'Ercola v. United States, 361 F.2d 211 (2d Cir. 1966). The affidavits of the federal employee and Pierro are hearsay, and would not be admissible at a hearing. In addition, the federal employee avers only that Christophe stated his belief that, had he testified, Panica would not be in jail. In this respect the affidavit is merely conclusory for, hearsay problems aside, it does not indicate the details of the testimony Christophe could have allegedly offered, but merely Christophe's conclusion as to the probable result of that testimony.

The motion for a new trial is equally lacking in support, being based upon the same affidavits.

For the reasons stated, Panica's motions are denied.
So Ordered.


U.S.D.J.

Dated: New York, New York
November 25, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR PANICA,	CIVIL ACTION NUMBER
Petitioner	(IN RE: 72 CR 313)
vs.)
UNITED STATES OF AMERICA,	NOTICE OF MOTION
Respondent)

To: Hon. Paul J. Curran, Esq.
United States Attorney
Southern District of New York
New York, New York 10007

Sirs:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of VICTOR PANICA, sworn to, on the 1st day of August, 1975, and upon all other proceedings heretofore had, the records of prior proceedings include statements of witnesses and briefs; the undersigned will move this Court, before the Honorable IKE GAGLIARDI, U.S.D.J., at the U. S. Courthouse, Foley Square, N.Y., on the 2nd day of September, 1975, at 10:00 o'clock in the forenoon, of that day, or as soon thereafter, as the Petitioner can be heard, and for an ORDER directing the Government to produce the Petitioner at said hearing pursuant to Title 28, U.S.C. § 2255, and for such other and further relief as this Court may deem just and proper.

Yours etc.,

Victor Panica
Victor Panica, Petitioner
United States Penitentiary
Box 200-76678-158
Atlanta, Georgia 30315

Dated: August 1, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

VICTOR PANICA,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

CIVIL ACTION NUMBER

(IN. NO. 72 CR 313)

AFFIDAVIT IN SUPPORT OF MOTION TO
VACATE SENTENCE PURSUANT TO U.S.C. 2255

STATE OF GEORGIA)

COUNTY OF FULTON)

VICTOR PANICA, who, after being duly sworn, according to law, on oath deposes and says:

That I am the Petitioner in the above entitled cause of action, and am the convicted defendant in Indictment Number 72 CR 313.

That I am presently incarcerated at the United States Penitentiary, Atlanta, Georgia, serving a sentence imposed by the Honorable LEE P. GAGLIARDI, U.S.D.J., on June 20, 1972.

That the sentence of twenty (20) years on each of the two counts, with a special parole term to follow of six (6) years; sentences to run concurrently with each other, was imposed, after a filing of recidivist information of a prior narcotics conviction.

That the Affiant/Petitioner has maintained his innocence of the charges against him throughout the entire proceedings, and in retrospect, does state unequivocally, that the records and files of the case, disclose a total disregard of Professional Responsibility, on the part of the Assistant United States Attorney, WARREN J. BROTHMAN, and an abuse of

Judicial discretion by the Sentencing Court.

That there existed a "conflict-of-interest" between the Petitioner, and his trial counsel, GINO GALLINA, Esq., and that the conflict was intentionally, and maliciously created by the Assistant United States Attorney, WALTER J. KROGMEYER. Verification of this may be had by an Affidavit submitted by one Lt. CANTRELL, Federal Detention Headquarters, New York City; wherein Lt. CANTRELL stated that CHEMISTONE, while confined at the West Street Facility, had stated to him that Assistant United States Attorney, WALTER KROGMEYER, wanted him (CHEMISTONE) to involve GALLINA in alleged illegal acts.

That subsequent to the conversation, alluded to above, GINO GALLINA, Esq., was, on two separate occasions, brought up for Grand Jury investigation, as a result of the actions of Assistant United States Attorney, WALTER KROGMEYER; thus precluding counsel from offering the defense as an advocate.

That further conflict existed in that counsel for CHEMISTONE; Jeffrey C. Hoffman, Esq., and counsel for Petitioner, GINO GALLINA, Esq., were members of the same law firm, and, as shown in the "Motion for Separation", filed in the form of an affidavit, GALLINA, was well aware in the actions to be taken by CHEMISTONE, in the event of a severance, however, since CHEMISTONE was a client of his own law firm, ethics prevented GALLINA from disclosing the fact earlier; i.e. that CHEMISTONE was going to invoke his "Fifth Amendment Privilege", at the trial of Petitioner; thereby, precluding other defensive strategy, because ethics overrode his role of an advocate.

That prosecutorial mis-conduct was evident, by the attached Affidavit of HENRY MC GOWAN, Correctional Officer, Federal Detention Headquarters, West Street, New York City, since MC GOWAN, withdrew his verified statement, the affidavits of the investigators and counsel are submitted in direct substantiation of MC GOWAN'S statement.

That the Sentencing Court exhibited its prejudice toward the Petitioner by:

- (1) Not conducting an inquiry "on-the-record" of the possible conflict of interest existing by counsel from the same firm representing two co-defendants; especially so upon ruling on "Motion For Severance", wherein, Petitioner's counsel relied on the testimony of CHRISTOPHER to exonerate his client. Once the Court was informed that CHRISTOPHER would take the "PITCH", the Court had a legal, and moral responsibility to conduct an "on-the-record" inquiry to determine the extent of the conflict that existed.
- (2) The action taken by the Court in denying Petitioner relief under his Rule 35 Motion For Mitigation, and the Denying of Motion for Mitigation of CHRISTOPHER. The obviousness of such proceedings, in the instant case, was not one of sound for testifying as a Government witness, but a sound for not testifying, when the Court and the Government were cognizant of the fact that CHRISTOPHER'S testimony would exonerate the Petitioner.

WHEREFORE, for all of the above reasons, the attached ~~ANSWER~~
of Counsel, and the investigations, the availability of supportive witnesses,
and the Memorandum of law, the Plaintiff/Petitioner states that since the
Records and the Files of the case do not conclusively show that the Pet-
itioner is not entitled to the relief requested, the Court is ~~ordered~~ to
ORDER an Evidentiary Hearing, whereat witnesses may be called on the behalf
of the Petitioner, and from a determination of the facts presented, in
relation to the applicable laws, the Court issue a Writ of Habeas,
and cause the Judgment of Commitment to be set aside, and dismiss the In-
dictment, and/or for all other relief deemed just and proper.

Victor Panica

~~Victor Panica, Esq., New York, N.Y.~~

SERIALIZED AND SUBSCRIBED BEFORE ME

THIS 1 DAY OF AUGUST, 1975.

AUG 01 1975

SEARCHED INDEXED SERIALIZED FILED
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE
July 7, 1956 to Administration (18 U.S.C.
4004).

CERTIFICATION OF SERVICE BY MAIL

I, hereby certify that I have mailed a copy of the foregoing
and following motions to ERIC J. GROSS, ESQ., UNITED STATES ATTORNEY,
FOR THE SOUTHERN DISTRICT OF NEW YORK, U. S. GOVERNMENT, PO BOX 875,
NEW YORK CITY, NEW YORK, 10007, by sending it certified MAIL-MONEY
RECEIPT REQUESTED ON THIS 1 day of August, 1975.

Victor Panica

~~Victor Panica, Esq., New York, N.Y.~~

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR PANICA,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

MEMORANDUM OF LAW IN SUPPORT OF

MOTION TO VACATE SENTENCE

Petitioner was arrested, and indicted with three other co-defendants, charged with violations of 21 U.S.C. § 841(a)(1), 812 and 846; attempt to distribute, and conspiracy to do so. The Petitioner's only crime was riding in an automobile with co-defendants, and fleeing the scene, after a police chase. After the Judicial and Prosecutorial "fairness" in handling this case, there would be absolutely no justification for any citizen to not speedily flee, at the first glimpse of a policeman's uniform.

At the inception of the proceedings, Petitioner's counsel moved for a severance, as he had the assurance of his law partner that co-defendant CHRISTOPHE, after severance, with separate trials, would be available to testify on behalf of the Petitioner, and a factual statement by CHRISTOPHE would exonerate the Petitioner from any complicity in the alleged crime.

Shortly, thereafter, as supported by the Affidavit of Henry McGowan, Correctional Officer, later recanted on request, but substantiated by first-party Affidavits in support, CHRISTOPHE was taken-in-hand by Assistant United States Attorney, WALTER J. HIGGINS, and as

the attached affidavit's would show that MCGOWAN's statement shows he (CHRISTOPHER) was threatened into not testifying on behalf of the Petitioner. For other showing of prosecutorial misconduct, HIGGINS, attempted to have CHRISTOPHER furnish him with indictable information of Petitioner's counsel GALLINA. Such action of the Assistant United States Attorney does not fall within the scope of "duties", as a fair, public, crusader. Attempting to place Petitioner's counsel GALLINA in a compromising position, thereby, negating his active participation as an advocate. The Petitioner would produce witnesses to support this allegation at an evidentiary hearing.

The Petitioner was found guilty, sentenced as a second offender, and given twenty (20) years, not because of being a witness against him, but because the Government prevented witnesses from testifying for him. The final stroke of prosecutorial interference with the Sixth Amendment Right to counsel, and witnesses in his behalf, was displayed by CHRISTOPHER's disclosure to one LT. CARTER, a correctional officer in the West Street Facility, that petitioner's counsel be placed in a compromising position whereby adequate representation was impossible.

Since the COURT, MR. HIGGINS, CHRISTOPHER, and his counsel (GALLINA'S partner), were aware, by the Motion to Suppress, that Petitioner's total case, depended upon CHRISTOPHER becoming a witness in his behalf, and only telling the truth, it was not difficult for Mr. HIGGINS, to make his moves as shown in the Affidavits attached. Mr. HIGGINS effectively planted the seed of conflict of interest, through coercion and this Petitioner was left without effective counsel or witness for his defense, hence the verdict of the jury.

To affirmatively state that the Court was aware of the total "happenings" would "mar the walls of justice", therefore, to end such speculation, an Evidentiary Hearing, with MCCORMAN, LT. GAFFER, GINO GALLINA, CHRISTOPHE (now that he is released from further custody) present, and available for testimony would correct the injustice of the total proceeding. After such a hearing, the only explanation the Court should be disposed to make is why CHRISTOPHE'S rule 35 motion for mitigation was so potent, as to cause the Court to act so dramatically on the request; and, to explain, "in the interest of justice" why an on-the record hearing as to possible conflict of interest in counsel, when GALLINA'S partner, was advising CHRISTOPHE to take the "Fifth", after the agreement apparently reached prior to the submission of MR. GALLINA'S, Motion to Suppress, then if the Court could have a disclosure of Counsel GALLINA'S Grand Jury callings--then, and only then, can the scales of Justice remain untarnished, anything less than a full evidentiary hearing would do an injustice to our whole system of Due Process and equal protection.

Although most cases wherein it is alleged that a conflict of interest, with counsel exists, it is usually a situation where one attorney represents opposing co-defendants. However, the same designation is, of course, present when one partner makes his case an 'open-book' till the day of the trial (as in the instant case), and where a client's counsel is intimidated by the Assistant United States Attorney.

The landmark case of Glasser vs. United States, 315 U.S. 60 (1942) points out that a joint representation of co-defendants (This would extend to counsels from the same firm, as shown by the affidavits in support of the Motion to Suppress, and the predominate use of word "I have been"

been served by...."), in an area of possible conflict one without a conviction, and that a serious duty rests upon the trial judge to insure that the representation is so that both defendant's rights are protected. 315 U.S. at 71. Moreover, the Supreme Court characterized the Trial Judge failure in Glasser to ascertain on the record each defendant's knowing and intelligent decision to proceed with a common counsel, as:

"....a dangerous laxity on the part of the trial judge in the discharge of his duty to procure the fundamental rights of an accused." 315 U.S. at 72.

Some courts have gone so far as to apply the Glasser rationale as to hold that:

".....only where we can find no basis on the record for an informed speculation that appellant's rights were prejudicially affected on the conviction stand." Aldar vs. United States, 376 F. 2d. 243 at 247.

WHEREVER, the Court must ORDER an Evidentiary Hearing whenever the Petitioner may support his motion, and affidavits with testimony.

Victor Poncia
Victor Poncia, Attala

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR PANICA, Petitioner
vs.
UNITED STATES OF AMERICA, Respondent

) MOTION TO PROCEED IN PRO SE
AND APPOINTURE OF ATTORNEY.

VICTOR PANICA, who, after being duly sworn, according to law
on oath, deposes and says:

That he is a prisoner in custody at the United States Penitentiary, Atlanta, Georgia, under custody of a sentence of this Court.

That he is without funds, to proceed on the Grace of God, and that he moves this Court pursuant to the provisions of 28 U.S.C. § 1915, for permission to proceed, in forma pauperis.

That he is a pauper, within the meaning of the law of Adkins v. Dep't of Agriculture, 335 U.S. 111, and prays that this Court grant him permission to proceed as a poor person.

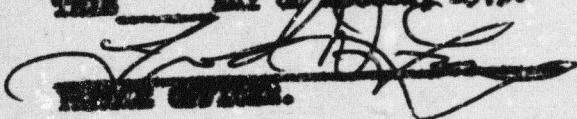
Victor Panica

VICTOR PANICA, Petitioner

STATE OF GEORGIA) ss
SUBMIT OF PETITIONER)

MOTION TO AND SUBSCRIBED BEFORE ME

THIS 1 DAY OF AUGUST, 1975.



AUG 01 1975

This document is filed by the Act of
July 7, 1955 to eliminate costs (28 U.S.C.
4004).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

AFFIRMATION

72 CR 313

Defendant.

STANLEY M. MEYER, an attorney duly licensed to practice in the Courts of the State of New York, hereby affirms under penalty of perjury;

I was the attorney for VICTOR PANICA and was engaged to prosecute a Motion for a new trial and a proceeding pursuant to 2255, on the basis that HENRY MC GOWAN, a federal guard employed at West Street was told that a co-defendant, NICHOLAS CHRISTOPHE, could have testified and exonerated MR. PANICA but was prevented from doing so by the Assistant United States Attorney.

In the course of our representation, we hired two private investigators to interview that employee (HENRY MC GOWAN). They secured a statement from HENRY MC GOWAN, on August 8, 1973.

Thereafter, while the proceeding was pending, the above named HENRY MC GOWAN, suddenly appeared at my office on November 20, 1974. I had never seen him or spoken to him prior to that time. Mr. MC GOWAN stated that he had been having great apprehension over the statement he had given and was afraid of losing his job. He also said that some parts of his statement may not have been true, but he then changed his mind and said they were true after all. At any rate, I told him that he should either see the F.B.I. or the United States Attorney if he wanted to tell them about it or recant his statement.

I also told him that he should tell the truth, and if a hearing was granted that he should take the stand and tell the absolute truth. I asked him whether the F.B.I. had been around to see him and he answered that they had not.

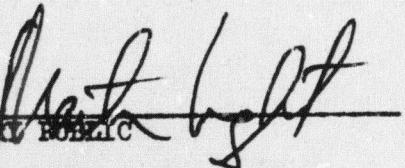
Mr. MC GOWAN then left my office and two days later, on November 22, 1974 he telephoned me and told me that his statement was true after all and the only reason he had come to see me was because he had been thinking about getting out of the statement and having to be a witness because he was afraid he would lose his job. Immediately after this happened I wrote a letter on November 22, 1974 to Chief Judge of the Court of Appeals as well as the Chief Judge of the United States District Court advising what had happened.

Dated: Brooklyn, New York
July 27, 1975


STANLEY M. MEYER

SWORN TO BEFORE ME THIS

DAY OF JULY, 1975.


NOTARY PUBLIC

MARTIN LIGHT
Notary Public, State of New York
No. 24-2362820 - Qual. In Kings Co.
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

VICTOR EMMICK,

Defendant.

AMERICAN

72 CR 313

STATE OF NEW YORK)

188.:
COURT OF KINGS)

HAROLD RACK, being duly sworn, deposes and says:

I was engaged by the law firm of FRIEDMAN, HENNER & LIEBT to interview HENRY MC GOWAN, a federal employee of the United States Detention Center on West Street in connection with a statement allegedly made to him by one, NICHOLAS CHRISTOPHE that he could have exonerated VICTOR EMMICK but was prevented from doing so by an Assistant United States Attorney.

I telephoned the Detention Center and made an appointment to see HENRY MC GOWAN on August 8, 1970. I met him and interviewed him in my automobile at approximately 10:15 a.m. at West 12th and West Streets. He gave me a statement which I believed to be true, and I also taped the conversation by means of a tape recorder in the automobile without the knowledge of HENRY MC GOWAN. The statement was signed by HENRY MC GOWAN on each page, and essentially he said that CHRISTOPHE TOLD HIM that if he took the witness stand to clear EMMICK, he would be prosecuted for bank robberies. He also said that if he had testified at the trial, EMMICK would not be in jail.

A

44

I believe the statement was made voluntarily and there was not any threats or promises made by myself or anyone connected with me.

~~Henry H. Ray~~
Salvatore J. Pelle

Sworn to before me this
15th day of July, 1975

Mark Light

MARTIN EIGERT
Notary Public, State of New York
No. 24-2362820 - Qual. In Kings Co.
Commission Expires March 11, 1977

45

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

Lt.

CARTER, being duly sworn, deposes:

1. That I am a member of the Federal Bureau of Prisons, a lieutenant of guards, and presently am operations officer of Detention for Men at West Street, New York, New York since before 1972.

2. That during a period of my duties as mentioned above, I know, in early 1972, a prisoner by the name of Nicholas Christophe.

3. I recall Nicholas Christophe being present in the institution during two basic periods, those being from approximately February, 1972 through May or June, 1972 and from September, 1972 through December, 1972. During these two periods I had numerous occasions to speak with Mr. Christophe, and in fact, he often sought me out for general conversations and advice. At the period of Mr. Christophe's detention passed, he told me over a series of conversations that he was being threatened by Assistant United States Attorney Hicks (Higgins?) with being arrested and prosecuted for a number of bank robberies. Mr. Christophe also stated that he was being pressured by Mr. "Hicks" to testify against a "Mr. Cimy" who was his friend. When he asked me what he should do, I told him he should speak to his attorney. But when he did, he said the pressure of those who were trying to tie some old claims his own attorney and relation that that was pretty hard to believe, that a United States Attorney would do such a thing, to which Mr. Christophe said it's hard to believe but it's true, he also he was promised by Mr. Hicks that he would be let out of prison if he would do so.

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4. During the later period of Mrs. Flanders' illness I noted a marked deterioration in his mental status. One day he was seen to be crying, praying and at times, extremely nervous. He often mentioned that his baby was sick and was being taken care of.

5. I have read each and every one of the statements made by Mr. Flanders and they are all true.

Lt.

Sworn to before me this

day of June, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKVICTOR PANICA.

Petitioner,

ATTORNEY

75 Civ. 5898 (LPG)

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

THOMAS M. FORTIN, being duly sworn deposes
and says:

1. I am an Assistant United States Attorney
in the office of Thomas J. Cahill, United States Attorney
for the Southern District of New York.

2. I submit this affidavit in opposition
to the motion of petitioner Victor Panica, proceeding
~~MS. NO.~~ for a hearing pursuant to Title 28, United States
Code, Section 2255.

3. Since "the motion and the files and
records of the case conclusively show that the prisoner
is entitled to no relief" the motion must be denied with-
out hearing. Title 28, United States Code, Section 2255.

THOMAS M. FORTIN

4. Because Panica, in substance, seeks to
relitigate issues decided adversely to him on a prior motion
pursuant to Title 28, United States Code, Section 2255, the
prior proceedings are here reviewed.

TMF: mg

5. Indictment 72 Cr. 313, filed March 17, 1972, charged Victor Ponica, the petitioner, Albert Pierre, Nicholas Christophe and Frank Buffalone with possession of 39.8 pounds of heroin with intent to distribute and with conspiracy to do so in violation of Title 21, United States Code, Sections 812, 841 and 846. Ponica was convicted on May 2, 1972 on both counts; Buffalone was acquitted by this Court at that trial at the end of the Government's case. Pierre and Christophe were thereafter tried together without a jury and both were found guilty.* On June 20, 1972, Ponica, Pierre and Christophe were sentenced. Ponica was sentenced to a jail term of 20 years.

TMF

6. All three convictions were affirmed by
this Court, ^e ^{of Appeals} United States v. Christophe, 470 F.2d 865
(2d Cir.) and the Supreme Court denied certiorari, 411 U.S.
964 (1972).

7. On March 25, 1974 Ponica filed a motion
(1) for a new trial pursuant to Rule 33 of the Federal Rules
of Criminal Procedure on the basis of "newly discovered
evidence" and (2) to vacate his conviction pursuant to
Title 28, United States Code, Section 2255.

* Pierre had pleaded guilty on April 26, 1972, but had been permitted to withdraw his plea.

TMF

TMF

8. Poncia's motion was supported by two affidavits. One of these was an ^eunsworn statement of an unidentified federal employee from the Federal House of Detention. The employee stated ^{that} while Christopher was incarcerated at the House of Detention, the employee came upon Christopher, crying in his cell and asked him if anything was wrong. Christopher replied that "if he had testified at the trial of Poncia, Poncia would not be in jail today." And further, that "the United States Attorney had told him [Christopher] that if he took the witness stand to clear Poncia, he, the United States Attorney, would prosecute him for bank robberies."

TMF

TMF

TMF

9. The second affidavit ^{WAS} from Pierre and ^{of} two alleged that, prior to either ^{to} the trials on indictment 12 Cr. 313, he overheard conversations between Poncia and Christopher in which Christopher told Poncia that "when the proper time arrived he would take the witness stand and exonerate Victor Poncia from any guilt." Pierre also states that Christopher told him personally, "outside of Poncia's hearing range that he [Christopher] would do anything Mr. Higgins [the Assistant United States Attorney then in charge of the case] told him so long as Mr. Higgins promised him that he would be allowed to visit his sick daughter." Pierre further states that he has remained

silent on the subject until this time because he feared reprisals from the United States Attorney's office.*

19. On November 25, 1974, this Court denied the motions in a memorandum opinion holding that the affidavits submitted by Paxton were not sufficient to warrant relief because they did not qualify as proper evidentiary material to support either motion in that the affidavits contained merely hearsay allegation which would not be admissible at a hearing. In so holding, this Court relied on D'Andrea v. United States, 361 F.2d 211 (2d Cir. 1966). On May 14, 1975, the Court of Appeals affirmed ^c from the bench without written opinion this Court's denial of Paxton's motion.⁵

TAF

* In opposition to the motions the Government submitted, among other things, a sworn affidavit of former Assistant United States Attorney Higgins categorically denying that he made any of the threats that were alleged. The Court's opinion makes it clear, however, that the Court did not, as arguably it could not, take this affidavit into account in denying the motion.

NATL

TMF
TWF
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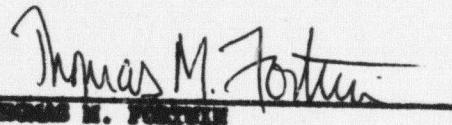
11. Panica has submitted no new evidentiary in support of his new motion which would entitle to him to relief and, in fact, merely reasserts the grounds for relief previously set forth. Panica submits affidavits of Stanley M. Meyer, Esq., the attorney who represented Panica on the ~~first~~ motion, and Meyer's investigator, Herman Race. These two affidavits do no more than identify the previously unidentified employee at the Federal House of Detention as Henry McGowan, and indicate that he was reluctant to give a sworn statement. These affidavits do not change the hearsay nature of the allegations which was the basis upon which this Court denied the earlier application. In addition to these two affidavits, Panica submits the affidavit ^{of} Lieutenant Carter, the lieutenant of guards at the Federal House of Detention. According to Carter, Christophe told him that an Assistant United States Attorney was threatening him with prosecuting him for a number of bank robberies. In addition, Carter states "Mr. Christophe also stated that he was being pressured by Mr. Hicks [presumably, Assistant United States Attorney Walter Higgins] to testify against a Mr. Gino [presumably attorney Gino Gallina, who represented Panica at trial] who was his friend." While the relevance of these conclusory allegations is somewhat obscure, they are, in any event, based solely on hearsay and are in precisely the same category as those originally submitted by Panica in support of his motion and rejected by this Court and the Court of Appeals as insufficient to require a hearing.

12. In addition to the affidavits of Meyer, Race and Carter, Panica submits his own affidavit alleging in

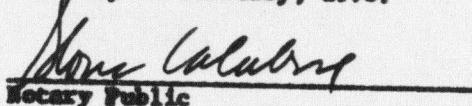
conclusory terms a conflict of interest between Gino Gallina, Esq., who represented Panica, and Jeffrey C. Hoffman, Esq., who represented Christophe. Gallina and Hoffman at the time were partners in the same law firm. Panica alleges a further so-called "conflict of interest" in that Gallina had himself been investigated by a Grand Jury sitting in the Southern District of New York. As to the second alleged "conflict of interest," it is hard to see how this created a conflict of interest at all. As to both allegations, it should be sufficient to note:

(1) the allegations are speculative and merely conclusory. A hearing is required only where detailed evidentiary facts are alleged. Michel v. United States, 507 F.2d 461, 464 (2d Cir. 1974); Bulli v. United States, 491 F.2d 758, 760 (2d Cir. 1974); O'Neal v. United States, 486 F.2d 1034, 1036 (2d Cir. 1973); United States v. Mizrahi, 437 F.2d 1255, 1258 (2d Cir. 1971); (2) Panica has not cited any example of prejudice resulting from the alleged conflict of interest. In this regard, it should be noted that Panica and Christophe were tried separately.

WHEREFORE, the motion should in all respects be denied without a hearing.


Thomas M. Fenton

Sworn to before me this
10th day of February, 1976.



Tony Calabrese
Notary Public

GEORGE CALABRESE
Notary Public State of New York
#A-1074311
Clerk of Court - Bronx County
Commissioned January 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR PANICA,

Petitioner

-v-

75 CIV 5898 (LPG)

TRAVERSE IN OPPOSITION
TO MOTION TO VACATE
SENTENCE.

UNITED STATES OF AMERICA,

Respondent

Victor Panica

The Government, through Thomas M. Fertain, Assistant United States Attorney, submitted an Affidavit in Opposition to a "prior" proceeding alleging that everthing included in the present motion had previously been adjudicated and that the only difference was the inclusion of "proper" names in the affidavit-further that the Court had previously ruled that the Affidavits would not be legally referable as Evidentiary material.

Further that Mr. Higgins submitted an affidavit categorically denying that he made any threats, but the court properly did not consider this affidavit.

The purpose of Section 2255 of Title 28 U.S.C. is that a prisoner in custody pursuant to a sentence of a Court may bring habeas corpus action contesting the illegality of his conviction and sentence, back to the Sentencing Court where the Records and the Files of the case are available so that these records and FILES may be reviewed to see whether they disclose that an Evidentiary Hearing is needed to determine the credibility of the claims of the Petitioner. Certainly the "Records" and the "Files" of this case cannot, and do not dispute the allegations contained in this Petitioner's motion, and it would be impossible under the holdings of Section 2255 for

the Government to "Answer with an Affidavit" from those records and files.

Although the affidavits may be considered as "hearsay" as to the proof of innocence of the petitioner, they are substantial allegations of fact that reach the very core of a prima facie showing of gross prosecutorial misconduct that caused a conflict of interest to arise between petitioner's counsel, and the proper defense of the petitioner's case that can only be resolved through the process of an Evidentiary Hearing.

It is difficult at best, and a Herculean task for a prisoner to combat the vast power and resources of the Government whose agents are able to "seal-off" such relevant information as the Transcript of the Rule 35 Motion to Reduce Sentence of CHRISTOPHER. If we are to assume that the real purpose of the government is to prosecute the guilty and to preserve the principles of Due Process of Law, then their pertinent proceedings should stand as an open book, and not as a secret unviewable record of Totalitarian deception that is the trademark of a police state.

When an issue of possible conflict of interest arises, and the "Records and the Files of the Case" cannot refute such allegation than the mere conclusory statement that "This issue has been previously raised", is not a sufficient showing by the Government that they have met their obligation of professionalism; and where there is a question raised as to the possible use of their office to coerce potential defense witnesses, the Government should not hide behind the shield of re-litigation, but should demand that a full Evidentiary Hearing be conducted to both protect the Due Process rights of a citizen, and to "clean the slime" from the scales

This case presents a unique issue, in that we are not dealing with the usual Government practice of suborning perjury, by failing to disclose "promises" made to a Government witness for falsely testifying; rather we are dealing with the "payments" made, after the threats have been effective, to a witness who could have vindicated the Petitioner. Therefore, the affidavit's presented cannot be loosely referable as hearsay since they make a factual showing of criminal interference with justice, and as such must be fully investigated and fully disclosed before a "trier of the facts" and not hidden behind the smoke screen of "re-litigation".

Since the Motion, and the Records and the Files show that the allegations cannot be refuted without a hearing, this Court must ORDER an immediate Evidentiary Hearing pursuant to 28 U.S.C. § 2255.

Respectfully submitted,

Victor Panico

Victor Panico, Petitioner Pro Se
United States Penitentiary
Box MB-74678-158

Atlanta, Georgia 30315

SWORN TO AND SUBSCRIBED BEFORE ME THIS 20 DAY OF FEBRUARY, 1976.

D. H. Hart PAROLE OFFICER.

CERTIFICATE OF SERVICE BY MAIL

I certify that I served a copy of the foregoing Traverse on Thomas M. Fortuin, Assistant United States Attorney, for the Southern District of New York, U. S. Courthouse, Foley Square-Annex, New York City, by sending it CERTIFIED MAIL-RETURN RECEIPT REQUESTED THIS 20 DAY OF FEBRUARY, 1976.

Victor Panico

Victor Panico, Petitioner Pro Se